Filed 4/6/04 P. v. Benitez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO MEJIA BENITEZ,

Defendant and Appellant.

F043112

(Super. Ct. No. 1052221)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. John E. Griffin, Jr., Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, J. Robert Jibson and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Buckley, J. and Wiseman, J.

A jury convicted appellant, Roberto Mejia Benitez, of one count each of driving under the influence of alcohol (count I/Veh. Code, § 23152, subd. (a)),[1] and driving with a blood alcohol content of .08 percent or greater (count II/§ 23152, subd. (b)). In a separate proceeding, Benitez admitted allegations pursuant to section 23550.5 that on July 11, 2001, he was convicted of driving with a blood alcohol content of .08 percent or more causing injury in violation of section 23153, subdivision (b). On April 17, 2003, the court sentenced Benitez to the aggravated term of three years on count I, a concurrent three-year term on count II, and a concurrent two-year term in case No. 1026087. On appeal, Benitez contends: 1) the evidence is insufficient to sustain the court's finding that he had a prior conviction within the meaning of section 23550.5, and 2) his sentence violates Penal Code section 654's prohibition against multiple punishment. We will find merit to this last contention. In all other respects we will affirm.

FACTS

The evidence at trial established that on December 28, 2002, the car Benitez was driving struck another car in Turlock. Benitez had a blood alcohol content of .27 percent at the time.

DISCUSSION

The Sufficiency of Evidence Issue

Ordinarily, driving under the influence in violation of section 23152, subdivisions (a) or (b) is punishable only as a misdemeanor. (§ 23536/Pen. Code, § 17.) However, section 23550.5,[2] in pertinent part, allows a section 23152 violation to be elevated to a

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[1] All further statutory references are to the Vehicle Code, unless otherwise indicated.

[2] As pertinent here, section 23550.5 provides: "(a) A person is guilty of a public offense, punishable by imprisonment in the state prison or confinement in a county jail for not more than one year and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1,000) if that person is convicted of a

felony if the 23152 violation occurred within 10 years of a "prior violation of Section 23153 *that was punished as a felony*. . . ." (Emphasis added.)

Benitez's convictions were elevated to felonies because he admitted allegations pursuant to section 23550.5 that he had a prior conviction for violating section 23153, subdivision (b), i.e., driving with a blood alcohol content of .08 or greater causing injury.

Benitez contends that there was no evidence that his prior conviction for violating section 23153, subdivision (b) was punished as a felony or that it maintained that status at the time of his present convictions. Thus, according to Benitez, since there was no evidence that this offense was punished as a felony, as required by section 23550.5, his current convictions for violating section 23152, subdivisions (a) and (b) must be reduced to misdemeanors. We will reject these contentions.

On March 17, 2003, prior to the taking of testimony, the following colloquy occurred when the court took Benitez's admission of the prior conviction allegations:

> "THE COURT: Do you admit or deny that on July 11th, 2001, that you were convicted of a Vehicle Code violation 23153 (b) which is driving while – with .08 percent or more of blood alcohol in your system and causing injury to another person, do you admit or deny that conviction?
>
> "[PROSECUTOR]: Your Honor, I think it has to be on the record that it's a felony.
>
> "THE COURT: Okay. It's a felony conviction. [¶] . . . [¶]
>
> "[THE DEFENDANT]: I admit."

"In reviewing a criminal conviction challenged as lacking evidentiary support, ' "the court must review the whole record in the light most favorable to the judgment

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violation of Section 23152 or 23153 and the offense occurred within 10 years of any of the following: [¶] . . . [¶]

"(2) A prior violation of Section 23153 that was punished as a felony. . . ."

below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citation.] The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence [citation], and to special circumstance allegations [citation]. *An appellate court must accept logical inferences that the jury* [*or court*] *might have drawn from the circumstantial evidence*. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396, emphasis added.)

Here, Benitez admitted that he had *a prior felony conviction* for driving with a blood alcohol content of .08 percent or greater causing bodily injury (§ 23153, subd. (b)). As noted earlier, this offense may be punished alternatively as a felony or a misdemeanor. (§ 23554.) However, Benitez did not present any evidence that his felony conviction was ever reduced to a misdemeanor. In the absence of such evidence, the court could reasonably infer that his felony conviction was never reduced to a misdemeanor and that it was punished as a felony, i.e., with a grant of felony probation (*People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390) or a prison term (Pen. Code, § 17, subd. (b)(1)). Accordingly, we reject Benitez's contention that his two current offenses must be reduced to misdemeanors because the evidence is insufficient to show that his prior conviction was punished as a felony.

The Penal Code Section 654 Issue

Benitez contends that the concurrent three-year term the court imposed on count II must be stayed because his convictions in counts I and II both arose from a single incident of driving under the influence. Respondent concedes and we agree.

Penal Code section 654 in pertinent part provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." This precludes

multiple punishments for a single act or indivisible course of conduct. (*People v. Miller* (1977) 18 Cal.3d 873, 885.)

Further, since both of Benitez's convictions were based on his single act of driving with a blood alcohol content of .27 percent, we find that the court should have stayed the concurrent three-year term it imposed on count II. (*People v. Duarte* (1984) 161 Cal.App.3d 438, 447.)

DISPOSITION

The judgment is modified to stay the three-year term the court imposed on count II. The trial court is directed to prepare an abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections. As modified, the judgment is affirmed.